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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. AND BUCK CONSTRUCTION COMPANY, INC.,
Petitioners,

v.

STATE OF IOWA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF OF *AMICUS CURIAE*, IOWA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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23 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. A REGULATORY TAKING CANNOT OCCUR UNTIL THE GOVERNMENT IMPLEMENTS ENABLING LEGISLATION TO THE EXTENT THAT ALL ECONOMICALLY VIABLE USE OF THE PROPERTY IS DESTROYED

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.
452 U.S. 264, 294-295 (1981) 4

Phelps v. Board of Supervisors
211 N.W.2d 274 (Iowa 1973) 5

Fitzgerald v. City of Iowa City
492 N.W.2d 659 (Iowa 1992) 5

Bakken v. City of Council Bluffs
470 N.W.2d 34, 36 (Iowa 1991) 6

Agins v. Tiburon
447 U.S. 255 (1980) 7

Keystone Bituminous Coal Assn., et al. v. DeBenedictis, Secretary, Pennsylvania Dept. of Environmental Resources, et al.
480 U.S. 470 (1987) 8

Williamson County Regional Planning Commission v. Hamilton Bank
473 U.S. 172 (1985) 9

MacDonald, Sommer & Frates v.
Yolo County
477 U.S. 340 (1985) 10

Lucas v. South Carolina Coastal Council
505 U.S. _____, _____,
112 S.Ct. 798 (1992) 3,4,12,13,14,16

Penn Central Transp. Co. v. New York City
438 U.S. 104 (1977) 14

Pennsylvania Coal Co. v. Mahon
260 U.S. 393, 413 (1922) 15,17

Statutes

Section 263B.7, Code of Iowa 6,10

Section 263B.8, Code of Iowa 11

Section 263B.9, Code of Iowa 6,11

Other

Federalist No. 10 15

INTEREST OF THE AMICUS CURIAE

The Iowa Farm Bureau Federation (IFBF) is a voluntary general farm organization formed in 1918 under the laws of the State of Iowa. The mission statement of the IFBF is to improve net farm income and the quality of rural life. IFBF was founded in order to protect, promote and represent both farm families and non-farm members who recognize the prosperity of agriculture is essential to the well-being of the State of Iowa. IFBF has over 156,000 member families, and the organization provides a unified voice on legislation that affects them.

The Iowa Farm Bureau Federation has a direct interest in the outcome of this case. The members of IFBF own or lease significant amounts of property, and many depend on their land for their livelihoods. They are, therefore, vitally interested in the proper interpretation of the Just Compensation Clause of the United States Constitution. The Iowa Supreme Court's ruling that a landowner owns his or her land subject to the Ancient Human Remains Statutes of the State of Iowa can be used by the State to effectively dispossess all Iowa property owners of their property rights without paying compensation. This is contrary to the interests of IFBF, its members, and all citizens of the State of Iowa.

STATEMENT OF THE CASE

The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use, without just compensation." The issue in this case is whether the Ancient Human Remains statutes of the State of Iowa can be used to effectively render a landowner's real estate valueless without the payment of just compensation therefor.

The IFBF does not propose to duplicate the legal arguments presented in the Petitioner's brief, but rather endorses and urges to this Court the statement of the case and legal arguments set forth therein. IFBF's purpose in submitting this brief amicus curiae is to add the voices of the 156,000 IFBF members to those of hundreds of thousands of Iowa property owners concerned with the dangerous limitations placed on the Fifth Amendment's guarantee of just compensation for regulatory takings as advanced by the lower court below.

SUMMARY OF THE ARGUMENT

The Iowa Supreme Court held that upon passage of a statute with general application to all real properties in the State of Iowa, all persons who purchase real estate subsequent to that enactment shall be precluded from receiving just compensation for the regulatory taking of their property when later the State implements the statute. By adopting such an untenable conclusion, the lower court has effectively prevented all landowners in Iowa from receiving just compensation guaranteed to them by the Fifth Amendment for future regulatory takings emanating from the Ancient Human Remains Statutes of Iowa. Regardless of the date landowners acquire their property, the statute of limitations will prevent them from being compensated even when state action takes away all economically viable use of the property. Such an unjust and unreasonable result was certainly not intended by the Court in Lucas v. South Carolina Coastal Council and the Court's prior rulings.

Guidance is needed from the Court in order to clarify and establish the Court's previous rulings that an action for a regulatory taking is not ripe for action by the Court until the governmental action in question strips away all economically viable use of the property.

I. A REGULATORY TAKING CANNOT OCCUR UNTIL THE GOVERNMENT IMPLEMENTS ENABLING LEGISLATION TO THE EXTENT THAT ALL ECONOMICALLY VIABLE USE OF THE PROPERTY IS DESTROYED.

The Iowa Supreme Court found Plaintiffs were not entitled to compensation on a regulatory taking theory because the Plaintiffs acquired the property ten years after the enactment of the Ancient Human Remains statute. Because the Plaintiffs acquired the real estate after the enabling statute became law, the lower court found the "bundle of rights" the Plaintiffs acquired when they obtained title to the property did not include the right to compensation years later when the state implemented the enabling legislation. This decision improperly misconstrues the Lucas decision and is in conflict with the Court's general rule that no regulatory taking can occur until a final decision is rendered by the government.

The Court has frequently admonished that the constitutionality of statutes should not be determined by the Court until a factual setting is established that makes such a decision absolutely necessary. See Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 294-295 (1981). As the Court previously stated in Hodel, "adherence to this rule is particularly

important in cases raising allegations of an unconstitutional taking of private property." Id., 452 U.S. at 295.

The Hodel decision concerned an attack on a law regulating coal mining prior to the law's enforcement against the particular plaintiff. The Court found the mere enactment of the law did not constitute a regulatory taking. The Act, on its face, did not categorically prohibit coal mining, but rather the conditions upon which coal mining operations could be conducted. The Act also left unregulated the use of the land aside from coal mining. Accordingly, the Court found the "mere enactment" of the Act had not deprived the Plaintiffs of all economically viable use of their property. Since "no concrete controversy" had been presented by the enactment of the legislation, the Court found an action for a regulatory taking was premature. Id., 452 U.S. at 296.

The Supreme Court of Iowa has also adopted this principle, especially with respect to actions for mandamus. The Iowa Court has found mandamus is limited to determining whether a factual issue exists permitting a determination that would produce a measurable decrease in a property's market value. Phelps v. Board of Supervisors, 211 N.W.2d 274 (Iowa 1973); Fitzgerald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992). Until state action has occurred and such decision is final, the action is not "ripe" for

determination by the courts. Bakken v. City of Council Bluffs, 470 N.W.2d 34, 36 (Iowa 1991).

The same rationale should be used in the present case and in future cases involving state implementation of the Ancient Human Remains Statutes. Had these Plaintiffs, their predecessors in land ownership, or any other landowner in Iowa presented a facial challenge to the Legislation prior to the discovery or knowledge of human remains on their land, the court would have likely, and correctly, dismissed such a claim as premature. By its terms, Iowa Code Chapter 263B does not necessarily restrict the use of real estate. The statute merely provides that the state archeologist shall have primary responsibility for investigating, preserving, and reinterring discoveries of ancient human remains.[1] Once such remains are discovered, the legislation only states "the state archeologist shall have the authority to deny permission to disinter human remains."[2] Based on this language alone, a landowner has no way of knowing what, if any, action will be taken by the state archeologist. Even a landowner with knowledge ancient human remains are located on his property has no cause of action or loss in value to his property until the state archeologist denies the landowner permission to disinter the human remains. It is at that moment the property is devalued by government action. Until that time the

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[1] Section 263B.7, Code of Iowa.

[2] Section 263B.9, Code of Iowa (emphasis supplied).

enactment of the Ancient Human Remains Act has had no effect on land ownership and use whatsoever as no final state action has occurred.

The Court has previously looked at this issue in the Agins decision.[3] In Agins, the Plaintiff had acquired five acres of unimproved land for residential development. The City of Tiburon, California later adopted zoning ordinances restricting the number of residences to be built on the tract. Without applying for permission to build as allowed by ordinance, the Plaintiff brought suit alleging the City had completely destroyed the value of the property. The Court found the zoning ordinance on its face did not amount to a regulatory taking.[4] Because the statute did not prevent all future land development, but rather allowed the plaintiffs the ability to pursue other reasonable investment expectations, it was premature to find a taking had occurred. Agins v. Tiburon, 447 U.S. 255 (1980).

In the case at bar, the Plaintiffs are not left to pursue other reasonable, investment-backed expectations. Both the majority and the minority opinions of the lower court acknowledge the state archeologist's decision to deny permission to disinter the ancient human remains has eliminated all economically viable use of the property in question. Unlike the plaintiff in Agins, the

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[3] Agins v. Tiburon, 447 U.S. 255 (1980).

[4] Agins v. Tiburon, 447 U.S. at 259.

decision has precluded the Plaintiffs from all investment expectations regarding the property.

The Keystone decision also involved a facial constitutional challenge to legislation. Once again the Court followed the rule that no regulatory taking can be established unless the petitioner can show the legislation has unduly interfered with his or her investment-backed expectations for the property.[5] As the Court stated,

> "we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation."

Keystone Bituminous Coal Assn., et al v. DeBenedictis, Secretary, Pennsylvania Dept. of Environmental Resources, et al., 480 U.S. at 495.

This is exactly the type of distinction the Iowa Supreme Court chose to ignore. The enactment of the legislation had no impact on the Plaintiff's property until the final decision of the state archeologist. Not until that decision -- a government action implementing prior

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[5] Keystone Bituminous Coal Assn., et al v. DeBenedictis, Secretary, Pennsylvania Dept. of Environmental Resources, et al., 480 U.S. 470 (1987).

legislation -- were the Plaintiffs entitled to just compensation.

The Court has further addressed this point in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). In that action, a landowner claimed a taking had occurred after the enactment of a particular ordinance. The Court found the action was "premature" and stated:

> "As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."

Id., 473 U.S. at 186. As the Williamson Court explained:

> "(T)he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury."

Id., 473 U.S. at 193. As the Court astutely acknowledged, the economic impact on a challenged state action cannot be evaluated until there is a final

decision regarding how the regulation will be applied to the particular land in question. Id., 473 U.S. at 191. In Keystone, the ordinance still left open the possibility the Petitioner could develop his property after obtaining variances; a final, reviewable decision had not yet occurred and an action for governmental taking could not lie. Id.

The principle that a final governmental decision is required before a taking can occur was reiterated by the Court in MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1985). As the Court succinctly stated, "any court cannot determine whether a regulation goes too far unless it knows how far the regulation goes." Id., 477 U.S. at 348.

The position of the Iowa Supreme Court blatantly ignores this important hurdle. At the time the Ancient Human Remains Act was enacted, it had no immediate effect on any real estate in Iowa, except to the extent permission was required to disinter human remains.[6] With regard to property owners who had not previously known human remains existed on their property, several steps had to occur before the statute's true impact could be known. First, someone had to suspect or find human remains. As the evidence showed in this case, this itself is no small feat. The human remains discovered in this case were 1000 to 2500 years old. After all that time, they were only unearthed after an unknown individual

[6] Section 263B.7, Code of Iowa.

"suspected" they might be there. It took the state archeologist twelve separate probes to find a cubic inch of human vertebrae, three small fragments of vertebrae surfaces, and five tiny, unidentifiable fragments.

Once the human remains are found, the landowner still has no idea what effect that has on the real estate. The impact depends upon the state archeologist's decision whether the remains discovered constitute a "significant find" pursuant to the statute. When and if the archeologist determines the finding is indeed significant, this still does not necessarily impact the landowner's property. The Code of Iowa establishes a state cemetery for the reinternment of human remains.[7] The Code further provides only that the state archeologist "has authority to deny permission" to disinter human remains upon request of the landowner.[8] Until the state archeologist actually denies such permission, the legislation does not impact the property's value at all. In the case at bar, that denial did not occur until 1991, well after the landowner purchased the property. It is at that moment the property was rendered valueless and a regulatory taking occurred.

The lower court sought to avoid this resolution based solely on the date the property was transferred to the Plaintiffs, reasoning that at the time the property

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[7] Section 263B.8, Code of Iowa.

[8] Section 263B.9, Code of Iowa (emphasis added).

was transferred, the state could have prevented disinternment. This assertion happens to be true of every property in Iowa regardless of date of ownership. Until the hurdles outlined above are placed before the landowner and permission to disinter is denied, this statute does not have any greater application to the Plaintiffs here than to a farm family who may have owned the property for 100 years. The timing of the land ownership is a distinction without a difference. It is the implementation of this legislation and not its enactment that triggers the regulatory taking, regardless of the length of ownership or the identity of the landowner involved.

The lower court's reliance on the Lucas[9] decision is misplaced. The Lucas decision certainly did not provide that if a statute is enacted prior to land ownership, and is implemented subsequent to its purchase to the extent the implementation renders the property worthless, no compensation should be granted. Common sense and fairness would not dictate such a conclusion. In Lucas, the regulation involved restrictions in building residences on coastal land. The particular restriction was not enacted into law until after the plaintiff obtained the property in question. Until that time, the plaintiff had the right to build a home on his coastal property. The timing of this regulation made a huge difference in the Lucas case because upon enactment of the legislation,

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[9] Lucas v. South Carolina Coastal Council, 505 U.S. _____, _____, 112 S.Ct. 2886, 120, L.Ed.2d 798 (1992).

there was an immediate impact on the property. Prior to the enactment of the legislation, the plaintiff was certainly already aware of South Carolina's interest in its coastal zones and its general regulation of uses in coastal areas.[10] The State's general interest only became a problem for Mr. Lucas when self-executing legislation was enacted directly impacting his property.

The Ancient Human Remains Statutes of Iowa, as enacted, are not self-executing. The legislation does no more than inform all owners and tenants of Iowa land that the state is interested in preserving ancient remains. It does not tell owners where those remains are located, what constitutes a significant find, or the state's plans regarding disinterring those remains. It does not impact landowners until the enabling legislation is implemented in a specific manner on a particular piece of real estate, as in this case.

A more reasonable construction of the Lucas decision actually supports the Plaintiff's claim. As was stated by this Court and cited by the minority in the lower court in the case at bar:

> "(T)here are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in

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[10] 505 U.S. _____, _____, 112 S.Ct. 1886, 2889 (1992).

> the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

Id. 505 U.S. at _____, 112 S.Ct. at 2895, 120 L.Ed.2d at 815.

The case at hand is a perfect example of this principle, further elaborated in Armstrong v. United States:

> "(T)he Fifth Amendment's guarantee . . [is] designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole."

Id., 364 U.S. 40, 49 (1960).

The Iowa Farm Bureau Federation concedes that legislation designed to promote the general welfare often burdens some citizens more than others.[11] The IFBF also recognizes the protection and preservation of archeological sites is likely included in the broad

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[11] See Penn Central Transp. Co. v. New York City, 438 U.S. 104 at 133 (1977).

spectrum of legitimate interests of the government.[12] The only question in this case revolves around whether the associated costs to the landowner must be borne by the landowner entirely or by all taxpayers. In answering that question, the Court must recognize the preservation and protection of property rights is every bit as important for the public as the preservation of these ancient bones. In fact, two centuries ago the Framers of our Constitution saw the protection of property rights -- land in particular -- as the "first object of government." Federalist No. 10 at 78 (Madison) (C. Rossiter ed. 1961).

Over eighty years ago Justice Holmes recognized both the necessity and the inherent danger of changes in the general law. In the often cited and much quoted words of Justice Holmes:

> "Government could hardly go on if to some extent values incident to property could be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police powers. But obviously the

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[12] "The information in these sites expands our knowledge of of human history and prehistory and thus enriches us as a state, nation, and as human beings," Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000,1005 (Indiana 1989).

> implied limitation must have its limits, or the contract and due process clauses are gone."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 at 413 (1922). Justice Holmes continued on to warn:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears . . .
>
> The general rule at least is, that while property may be regulated to a certain extent, if it goes too far it will be recognized as a taking."

Id., 260 U.S. at 415.

Simply put, the Ancient Human Remains Statute goes too far with respect to Lot 15 of Northridge Estates; but did not until the state's application and implementation of the statute to that property. The enactment of the legislation did not affect, nor take for public use, the property rights of the Plaintiffs, but its implementation has done just that. It is hard to imagine a governmental action that could go much further than to render a landowner's property essentially worthless as was done here. The lower court's ruling that the

Ancient Human Remains statute cannot be challenged by landowners despite the government's regulatory taking of their property because "the proscribed use interests were not part of title to begin with"[13] defies not only fairness and common sense, but the Constitution itself. No logical or reasonable inquiry by the Plaintiffs would have necessarily revealed that the Ancient Human Remains statute had rendered their property useless, because when they obtained the property that was not true. This could not be determined, predicted, or perhaps even imagined by the Plaintiff, until the State archeologist denied permission to disinter the remains. At that point, Plaintiffs lost their investment in Lot 15 entirely and should be compensated accordingly.

As all governments, the State of Iowa is every mindful of the financial condition of the state. When budgetary concerns are pressuring state government, and even the courts, it may seem easier to find the preservation of Iowa's heritage could be more easily borne by corporations and developers such as Plaintiffs rather than overburdened individual taxpayers. However, this is simply not constitutional. To uphold the trial court in this manner would ignore the admonition of Justice Holmes: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a short cut rather than the constitutional way of paying for the change." Id., 260 U.S. at 416.

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[13] Lucas, 505 U.S. at _____, 112 S.Ct. at 2899.

The Iowa Supreme Court's decision has not only unfairly denied compensation to the Plaintiffs, it has reduced to bare bones the property rights of all Iowans. As the lower court found in the minority opinion:

> "In this case, a dead bones doctrine has risen from the soil, like a phoenix, to consume the live marrow of land ownership. The history surrounding these ancient bones should be preserved by granting compensation for its resurrection."

CONCLUSION

The lower court's ruling is contrary to previous rulings of the Court that an action for regulatory taking is never ripe for decision by the courts until a final action has been taken by the government authority in question. Past decisions of the Court have developed the rule that an action cannot lie until the impact on the property involved has been determined. A decision by the Court is necessary to preserve the distinction between enabling legislation and governmental implementation of such legislation. Without the development of a rule to guide the lower court, the Iowa court's decision can be used to deny just compensation to all property owners in the state of Iowa when property is purchased after enabling legislation is enacted but before such legislation has any measurable

or substantive impact on the property involved. Finally, the lower court must be reversed to provide the Plaintiffs just compensation in this case. If the State of Iowa wants to preserve the history of its heritage for its citizens, landowners should not be forced to shoulder the entire burden for that preservation. The State should preserve its heritage the constitutional way and pay for it.

Respectfully submitted,

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